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No. ~~970~~ 44

In the

Supreme Court of the United States

OCTOBER TERM, 1966

CITY OF DALLAS,

Petitioner,

v.

INTERSTATE CIRCUIT, INC., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on August 30, 1966.*

* In addition to Interstate Circuit, Inc., the following are Respondents in this cause: Rowley United Theatres, Inc., Big Tex Theatres, Inc., Stanley Warner Texas, Inc., Tivoli Realty, Inc., Brooks Theatre, Inc., Trans-Texas Theatres, Inc., Arcadia Theatre, Inc., Big "D" Theatre Company, Frank Lucchese, DBA the Llaw Enterprise Co., General Cinema Corporation Academy Theatres, Inc., and the following have presented amicus curiae briefs: Columbia Pictures Corporation, Metro-Goldwyn-Mayer, Inc., Paramount Film Distributing Corporation, Twentieth Century-Fox Film Corporation, United Artists Corporation, Universal Film Exchanges, Inc., Warner Bros. Pictures Distributing Corporation.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in Interstate Circuit, Inc., et al., Appellants, v. City of Dallas, Appellee, and City of Dallas, Appellant, v. Interstate Circuit, Inc., et al., Appellees, 366 Fed. 2d 590, printed in Appendix B hereto—pages B-1 through B-32.

The opinion of the United States District Court for the Northern District of Texas in the case of Interstate Circuit, Inc., et al., Plaintiffs, v. City of Dallas, Defendant, 247 F. Supp. 906, printed in the Appendix B hereto—pages B-35 through B-64.

The opinion of the United States District Court for the Northern District of Texas in the case of Interstate Circuit, Inc., et al., Plaintiffs, v. City of Dallas, Defendant, 249 F. Supp. 19, printed in the Appendix B hereto—pages B-67 through B-85.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 30, 1966. (R. 515). Rehearing was denied on October 18, 1966. (R. 573). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

Whether the Circuit Court was correct in holding that the standard for classification, as distinguished from total censorship, must be restricted to the control of obscenity only insofar as young persons are concerned.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

Amendment I, Constitution of the United States, App. A, p. A-1.

Amendment XIV, Constitution of the United States, App. A, pp. A-1, 2.

Article I, Section 8, Constitution of the State of Texas, App. A, p. A-3.

Article XI, Section 5, Constitution of the State of Texas, App. A, pp. A-3, 4.

Article 527, Vernon's Texas Penal Code, App. A, pp. A-4 through 6.

Ordinance No. 11284 of the City of Dallas, Texas, App. A, pp. A-6 through 22.

STATEMENT

The jurisdiction of the District Court was invoked because there was a real and substantial dispute respecting the construction of the Constitution of the United States, thereby creating a federal question. Hence the result of the suit depended upon such construction. The amount in controversy exceeded the sum of Ten Thousand Dollars ($10,000.00).

Ordinance No. 11284 was enacted by the City Council of the City of Dallas on November 22, 1965 (App. A, pp. 6-22). The Respondents herein, exclusive of those who later intervened as amicus curiae, filed a complaint in the United States District Court for the Northern District of Texas on December 3, 1965, (R. 2). They sought to enjoin enforce-

ment of the ordinance and to declare the ordinance unconstitutional. The case was tried before the Judge without a jury and on December 20, 1965, Judge Sarah T. Hughes entered judgment denying the injunction (R. 58-59). In connection therewith the Court filed Findings of Fact and Conclusions of Law (R. 63-74). Judgment was appealed to the Circuit Court of Appeals for the Fifth Circuit and was submitted to the Court on May 23, 1966 (R. 460). On August 30, 1966, the United States Court of Appeals filed its written opinion affirming the opinion of the District Court (R. 461-513), and following this, issued its judgment dated August 30, 1966 (R. 515). Petition for Rehearing was filed in the United States Court of Appeals on September 19, 1966 (R. 543-572). This Petition for Rehearing and Motion to Enlarge the Record was denied on October 18, 1966 (R. 573).

The United States Court of Appeals, in affirming the decision of the District Court, accepted the concept of "variable obscenity", but in doing so applied the strict test of obscenity to those films which are not strictly censored but which are classified insofar as their presentation to young people is concerned. Judge Cox dissented in the opinion.

REASONS FOR GRANTING THE WRIT

The decision of the Court below decided an important question of federal law which has not been, but should be, settled by this Court. This question is whether or not films presenting matters for consumption by young persons under the age of sixteen (16) years, can be classified prior to their presentation on any standard other than the standard of

absolute obscenity. This is a matter of extreme public importance. It involves the distinction between classification and censorship, and the distinction between materials shown to adults and those shown to young persons under the age of sixteen. It involves a fundamental concept of the authority of the state as *parens patriae* concerned for the protection of its youth, but it presents novel questions as to the manner in which society may exercise this authority.

The subject ordinance was passed by the City of Dallas only after a decision in *Freedman v. Maryland*, 380 U.S. 51, and following the criteria set up in that case. The burden of proof is placed upon the City of Dallas. The advance submission of films is protected by a procedure that assures a prompt, final judicial decision.

Judge Wisdom in *In re Louisiana News Company*, E.D. La. 1960, 187 F. Supp. 241, suggested that:

> "* * * a state might enact a valid statute 'specifically designed to protect its children' from suggestive books and magazines that are not too rugged for grown men and women, * * *"

The City, in drafting the ordinance, followed the guide lines already prepared and recognized as being the legitimate interest of the localities throughout the nation when it attempts to prevent the dissemination of materials deemed harmful to children. The ordinance was aimed specifically at preventing exhibition to children and young persons of these films containing objectional material, rather than attempting to totally prohibit their dissemination. *Jacobellis v. Ohio*, 378 U.S. 184, *Butler v. Michigan*, 352 U.S.

380. In fact, by classifying rather than prohibiting, the City allows the free exhibition of the film but requires it to be done under circumstances which apprise the public of the dangers involved to young persons.

Even though motion pictures are under the liberty of expression granted by the First and Fourteenth Amendments to the Constitution, there is no requirement of "* * * absolute freedom to exhibit every motion picture of every kind at all times and all places." *Joseph Burstyn, Inc. v. Wilson*, 1952, 343 U.S. 495. The Court recognized that motion pictures as and of themselves, can possess a greater capacity for evil, and particularly among the young people of the community, beyond that of other modes of expression. The solemn and compelling interest of the state to protect its youth has been clearly expressed. The decision of the Circuit Court in denying to the City as an arm of the state, the right to exercise that protection is evident in its decision requiring the test of obscenity to this classification ordinance.

To limit classification, as opposed to censorship, to only those films portraying obscenity beyond any redeeming social value completely ignores the detrimental and damaging effect that extreme brutality and criminal violence or depravity exert upon the immature mind. It can be a disease implanted in young persons. Such a disease once implanted, reflects upon the whole of society and particularly upon the individuals most closely concerned. It becomes not only a personal problem but a social problem of state and local concern. The words will stand "* * * If there be

capacity for evil it may be relevant in determining the permissible scope of community control, * * *." *Burstyn v. Wilson, supra.*

The position of the Supreme Court has been one which indicates an acceptance of the concept of "variable obscenity" and a logical follow through of the process of reasoning would likewise grant a classification that varied as to young persons as distinguished from adults. Where the classification did not amount to a total censorship but allowed the showing under protected circumstances there should be no requirement of the test of total obscenity which implies total censorship. Freedom of expression is not denied, nor does the Ordinance attempt to restrict the exhibition or distribution of any motion picture. It merely sets forth the requirements as to the conditions under which a young person under the age of sixteen (16) years may view a motion picture classified as "Not suitable for young persons." The Dallas Ordinance does not attempt to tamper with anyone's work product, nor does it attempt to tread on a person's constitutional right to speak or to make a motion picture, but it merely attempts to protect the young, innocent and immature from exposure to motion pictures that are obviously adult entertainment and have no social value to young persons.

Not even the absolute freedom of religion is beyond regulation under the First Amendment, nor are the rights of parenthood beyond limitation but the State acting as "parens

patriae" may add certain restrictions in the interest of the youth's well-being. Such is the nature of child labor laws, compulsory vaccination and other items affecting the child's welfare. *Prince v. Commonwealth of Massachusetts*, 1944, 321 U.S. 158. The Circuit Court recognized that the containuance of a democratic society rests upon the healthy, well-rounded growth of its young people into full maturity as citizens. The misuse of the censorship power should be controlled in the process, this the Classification Ordinance has done under the standards as set forth by the court.

The one thing that the Circuit Court failed to recognize is that if the standard is applied as suggested by that Court and the movie is obscene insofar as young persons is concerned, then its presentation to young persons may be totally prohibited because it is not protected under the First Amendment to the Constitution. It need not be classified; it can be denied. This Ordinance does not attempt to do that but it fills in the safeguard of the parent and the adult without denying the right of freedom of speech. This is a novel and a new approach. It does not deny any of the constitutional privileges and yet it puts the State in its proper prospective of protecting the young and the immature. In this respect the opinion of the Circuit Court has denied effectiveness to all of the declarations that young people are different from adults, the standards applicable to them are different and their protection is the abiding and constant interest of the State in the protection of society. If

the lower courts do not understand it, apparently this question which is so important to our Federal law has not been and should now be settled by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Service of the within and receipt of a copy thereof is hereby admitted this ..... day of January, 1967.

.....
Attorney for Respondents.